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No. 75-1072

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

Joe Linden Blanton

v.

United States of America

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit is unreported. It is set forth in Appendix A to the Petition.

The opinion of the District Court for the Western District of Oklahoma denying petitioner's Motion to Dismiss Indictment (Information) is set forth in Appendix B to the Petition; it was not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1975 (infra, Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether the ambiguity of the information and repeated refusal by the Court to clarify the same until subsequent to the presentation of Final Agrument substantially prejudiced the Petitioner in his right to prepare an adequate defense and also in

Petitioner's right to protect himself after judgment against another prosecution on the same charge.

(2) (a) Whether the Petitioner was subjected to former and double jeopardy in being charged with the same charge twice in the criminal proceedings.

(b) Whether the Petitioner's acquittal of the former charge of conspiracy should preclude and demand a reversal of the latter or substantive charge(s).

Constitutional Provisions, Statutes, and Rule of Court Involved

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecution, the accused shall enjoy the right...to be informed of the nature and cause of the accusation..."

Rule 7(c) of the Federal Rules of Criminal Procedure, dealing with the nature and content of the indictment, provides as follows:

> "The indictment or the information shall be a plain, concise and definite written

> statement of the essential facts constituting the offense charged."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

Statement

(A) By Information the Petitioner was charged with one (1) count of conspiracy in conjunction with other named co-defendants. The other named defendants were charged with the overt acts of manufacturing copied sound recordings. The Petitioner was charged with the overt act of sale of the copied sound recordings but not the manufacturing thereof. All overt acts were alleged to be in violation of Sections 101(e) and 104 of Title 17, United States Code, the Federal Copyright Act. (Appendix C)

(B) By information the Petitioner was also charged in twenty-six additional counts with infringement of twenty-six copyrighted sound recordings in violation of 17 U.S.C. §§ 101(e) and 104.

(C) The Petitioner was acquitted by a jury of the conspiracy count but was convicted on seventeen substantive counts in violation of 17 U.S.C. §§ 1(f) and 104. (Appendix C)

(D) Throughout the District Court proceedings through various formal motions Petitioner attempted to define whether the charges were alleged violations of 17 U.S.C. § 1(f) of infringement of copyright through the unauthorized reproduction and distribution of specific sound recordings. (see Order on Motions to Dismiss Information by all defendants, Appendix B, Page 11).

(E) Clarification of this ambiguity was essential to preparation of the defense. The Court finally amended the Information in its

Instructions to the Jury but not prior to final argument by the Petitioner.

(F) The Court of Appeals for the Tenth Circuit recognized the ambiguity in the Information as error but regard it as not grounds for reversal (see Appendix A, Pages 3 and 4). They further rejected the Petitioner's argument that acquittal on the conspiracy charge precludes a conviction on the substantive counts.

Reasons for Granting the Writ

Ambiguity of the Information

The Court of appeals for the Tenth Circuit recognized the ambiguity contained in the Information, however, they dismissed the Plaintiff's contention stating that the error is not fatal (Appendix A, Page 3). This decision conflicts with the Sixth Amendment of the Constitution pertaining to the right of the accused "...to be informed of the nature and cause of the accusation..." The Tenth Circuit decision also

conflicts with Rule 7(c) of the Federal Rules of Criminal Procedure.

The ambiguity in the Information is more than just an erroneous code reference. The provisions of 17 U.S.C. § 101(e) protects musical compositions registered in Class E which have been reproduced mechanically on interchangeable parts. It further uses the language

> "...and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement..."

Whereas, the provisions of 17 U.S.C. § 1(f) is direct to the protection of sound recordings and prevents the unlawful reproduction and distribution to the public. The language used is

> "To reproduce and distribute to the public"

The general rule being that "penal statues must be strictly construed against the prosecution or be strictly construed against the person accused," U.S. v. Wells, D.C. Tex 1959, 176 F. Supp. 630, when applied to the two code sections

101(e) and 1(f) changes the elements of the crime, the burden of proof of the government and the burden of the defense.

The District Court replied to the Petitioner's contention of the ambiguity of the charges in the pretrial order of May 7, 1974 (see Appendix B, Page 11). The Court stated "the crime of 'record piracy' in violation of 17 U.S.C. sections 101(e) and 104 consists of four essential elements: (1) a copyrighted sound recording is manufactured, used or sold..." This judicial determination furthered the ambiguity of the Information through the trial and was not amended until instructions were given to the jury. The government was given the easier burden in proving "a sound recording is manufactured, used or sold" rather than the correct burden of proof as set out in section 1(f) that being to prove both reproduction and distribution.

The Supreme Court has set forth the test to be used in determining whether or not an indictment or information is sufficient. The Court, in presenting the test, stated:

> "The test of sufficiency of indictment is whether it contains elements of offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and whether the record shows accurately to what extent he may plead a former acquittal or conviction in any future proceedings against him for a similar offense." United States v. Debrow, Supra. at 376. See also Cochran and Sayre v. United States, 157 U.S. 286.

appellant's Sixth Amendment right was violated and the test as set forth in United States v. Debrow was not met as appellant could not adequately prepare a defense to the charge since he was not fully apprised of the charge because of the vagueness of the Information. Even though the lower Court finally clarified the Information, the Court did not do so, after repeated requests by appellant's counsel to so clarify, until just prior

to presentation of final argument. The entire trial process had virtually been completed before the Information was clarified thus appellant was not given the opportunity to conduct his defense adequately during the process of the trial.

In 1941 the Court stated that:

> "The purpose of the requirement that an indictment be sufficient to apprise the accused with a reasonable certainty to the nature of the accusation against him 'is to insure that the accused will be able to properly prepare and make his defense and thereafter be able to plead the judgment as a bar to a subsequent prosecution for the same offense and also inform the Court of the facts alleged so that it may properly decide the case and pronounce judgment.'" United States v. Henderson, 121 F.2d 75, 78 (D.D.C. 1941)

In order for appellant to have prepared his defense the Information should have been clarified prior to trial or during the early stages of trial. But when the Information is not clarified until near the end of the trial at a point just prior to final argument there is no opportunity for

appellant to prepare his defense so appellant is not truly aware of the real charges against him. Even if the Information is in the language of the statute, by which a person is charged, it is still "insufficient for the Information to charge simply in the language of the statute, if the statute itself fails to set forth expressly, fully, and clearly all elements necessary to constitute the offense." Huges v. United States, 340 F.2d 609, 610 (First Circuit 1965).

In the case of United States v. Donovan, 339 F.2d 404 (Seventh Cir. 1965) the appellant contended that the indictment was violative of appellant's Sixth Amendment right, as it failed to apprise the appellant of the nature and cause of the accusation against him. id at 407. The Court held, as to this indictment, that:

> "It is an elementary principle of criminal pleading that where the definition of an offense employs generic terms it is not sufficient to charge the offense in such

> generic terms but the indictment must state the specifics - it must decend to particulars." id at 407. See also Russell v. United States, 369 U.S. 749.

The Court in Donovan further stated:

> "The basis upon which this principle rests - the necessity that the indictment inform the accused with reasonable certainty of the specific offense with which he is charged - is, in our opinion, equally applicable where the statute, as it does here, prescribes different types of conduct in the disjunctive." id at 407 (Emphasis added).

The Petitioner urges this Court to review the decision of the Tenth Circuit in view of the Debrow case and the apparent conflicting decision of the Sixth Circuit and the First Circuit regarding the ambiguity contained in the Information. The Petitioner also urges this Court to review the judicial proceedings of the trial court in allowing the government to amend the Information after arguments of counsel and prior to the instructions to the jury.

Former and Double Jeopardy

The Fifth Amendment of the United States Constitution bars the Federal Government from prosecuting the accused more than once for a single offense. In determining whether the same offense is charged in two counts of an Information or in two Informations consolidated for trial, so that acquittal on one count will bar a conviction on the other, the test is whether the same evidence is required to sustain both counts, Hughes v. United States, 95 F.2d 538(1938). The test is stated differently in Double Jeopardy, Friedland, Page 109 (1969), second prosecution is barred when it is for the same conduct as the previous prosecution unless each requires proof of fact (material) not required by the other. In the case at bar the facts required to prove both the count of conspiracy and the twenty-six substantive counts of direct infringement by the Petitioner were identical.

This situation can be analogized to that in United States v. Clavin, et al. 272 F. 985 (1921), when the prosecution elected to prosecute the defendant upon a charge of conspiracy and was obliged to prove, as part of the charge, the larceny of goods. Having failed to convict on the conspiracy charge, the Court in Clavin, held there could be no subsequent prosecution for a larceny of same goods which the government has charged and failed to prove was committed by the defendant. The acquittal of the charge of conspiracy is res judicata upon every issue charged in the first count, United States v. Oppenheimer, 242 U.S. 87, as noted in Clavin. The acquittal on the conspiracy count bars prosecution for acts alleged as overt acts in the conspiracy count.

In further interpretation of Clavin, Justice Douglas spoke for the Supreme Court in revising a Third Circuit decision which had denied the doctrine

of res judicata in a criminal prodeeding:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. Pinkerton v. United States, 328 U.S. 640, 643. Thus, with some exceptions, one may be prosecuted for both crimes. Ibid. But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings. (United States v. Oppenheimer, 242 U.S. 85, 87; United States v. De Angelo, 138 F.2d 466, 468: 147 A.L.R. 991; see Frank v. Mangum, 237 U.S. 309, 334) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See United States v. Adams, 281 U.S. 202, 205.
>
> Thus, the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." Sealfon v. U.S., 332 U.S. 575 (1948), (See also U.S. v. Flowers, 255 F. Supp. 485 (1966) and State v. Cormier, 218 A.2d 138 (1960))

The Court of Appeals for the Tenth Circuit when presented with this argument deemed the Petitioner a principal not a conspirator in

accord with 18 U.S.C. § 2 (see Appendix A, Pages 5 and 6). However, the issue is not whether the Petitioner be called an "aider" and "abettor" or a principal or a conspirator; the issue is whether the finding of fact in the conspiracy count precludes conviction of the substantive counts.

The rule concerning this issue was presented in the case of U.S. v. Cole, C.A. MO. 1971, 449 F2d 194, certiorari denied 92 S. Ct. 987, 991, 405 U.S. 931, 30 L. Ed. 2nd 806, certiorari denied 92 S. Ct. 1200, 405 U.S. 975, 31 L. Ed. 2d 250. In the Cole case the court stated:

> "Substantive crime of conspiracy and that of aiding and abetting are separate offenses; thus, acquittal of conspiracy does not preclude conviction of aiding and abetting unless the acquittal results in a finding of fact in favor of the defendant which is essential to the substantive offense. (Emphasis added.)

In acquitting the Petitioner on the conspiracy count, it was essential that the jury make a finding

of fact in favor of the Petitioner regarding the overt act of "distributing (sale) the copied sound recordings." The same fact issue (distributing the copied sound recordings) was an element of the twenty-six substantive counts in violation of 17 U.S.C. §§ 1(f) and 104 (Appendix C). Thus, the Petitioner was placed in Double Jeopardy by the conviction of seventeen substantive counts.

The issue of Double Jeopardy is squarely before the Court in view of the decision in U.S. v. Cole, supra. The Petitioner submits that it is of constitutional importance and that it was erroneously decided below.

Conclusion

The Information was ambiguous on its face and was not clarified until after all evidence was submitted and the jury was being instructed. This ambiguity violated the rights of the Petitioner as protected by the Sixth Amendment.

That amending the Information during the instructions to the jury departs from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

Concerning this issue there are conflicting decisions among the Circuit Courts of Appeal which warrants review by this Court to clarify the issue.

The issue of Double Jeopardy is squarely raised. This constitutional issue is of paramount importance and stands as a basic constitutional right of the Petitioner. For all of these reasons, the Petitioner submits that a Writ of Certiorary should issue from this Court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 75-1082

UNITED STATES OF AMERICA	)	
	)	Appeal from the
Plaintiff-Appellee,	)	United States
	)	District Court
v.	)	Western District
	)	of Oklahoma
JOE LINDEN BLANTON,	)	(D.C. No. CR-
	)	74-61)
Defendant-Appellant.	)	

O. B. Johnston III, Assistant United States Attorney (William R. Burkett, United States Attorney, on the brief), for Plaintiff-Appellant.

Bruce H. Harlton, Jr. (Doyle & Holmes, on the brief), for Defendant-Appellant.

Before HOLLOWAY, McWILLIAMS and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

Joe Linden Blanton, Joseph Burton Bodin and Albert Bodin were jointly charged with conspiracy to willfully, and for profit, infringe the copyright of sound recordings copyrighted pursuant to Title 17, United States Code, by manufacturing and selling copies of such recordings without authorization of the copyright owners, in violation of 17 U.S.C. § § 1, 101 (e) and 104. The three were also jointly charged in twenty-six additional counts with infringement of twenty-six copyrighted sound recordings in violation of 17 U.S.C. § § 1, 104(e) and 104. Prior to trial Joseph Bodin pleaded guilty to the conspiracy count, and we are advised that the remaining charges against him were dismissed, as well as all charges against his son, William Bodin. At Blanton's trial, William Bodin testified as a Govenment witness. Blanton was acquitted by a

jury on the conspiracy count, but was convicted on seventeen substantive counts. Blanton was sentenced to six months incarceration, and in addition was fined $200 on each of the seventeen substantive counts. He now appeals, We affirm.

As indicated, Blanton was charged with the unlawful copying of sound recordings in violation of 17 U.S.C. § 101(e). The reference to 17 U.S.C. § 101(e) was in error. Section 101 (e) prohibits the unlawful copying of copyrighted works, as 17 U.S.C. § 1(f) which affords protection to copyrighted sound recordings. So the language of the information charged an infringement of the copyrighted sound recordings of others, but erroneously referred to § 101(e), instead of § 1(f). This error is not fatal.

An error in the citation of a statute, or its omission, is not grounds for dismissal of an indictment or information, nor is it grounds for

reversal of a conviction unless the error or omission misleads the defendant to his prejudice. Fed.R.Crim. P. 7(c)(3). United States v. DePugh, 452 F.2d 915 (10th Cir. 1971), cert. denied, 407 U.S. 920 (1972).

Our study of the present record leads us to conclude that Blanton was not misled to his prejudice by the erroneous statutory citation. The conspiracy count and all twenty-six substantive counts referred to the infringement of copyrighted sound recordings. Each of the substantive counts identified the sound recording by name, artist, copyright owner and registration number. There is no reference to any infringement of the musical work or composition behind the recording. We recently rejected this identical argument made in another criminal prosecution also arising out of the Western District of Oklahoma. See United States v. Malicoate, No. 74-1458 (10th Cir. July

28, 1975) (an unpublished opinion). We adhere to the rationale of Malicoate.

Blanton was acquitted on the conspiracy charge, but convicted on seventeen substantive counts. Counsel argues that the acquittal on the conspiracy charge precludes a conviction on the substantive counts and that to permit these convictions to stand would constitute double jeopardy. Such argument ignores the difference between one who is a conspirator and one who aids and abets the principal. The latter, under the applicable statute, is himself deemed a principal, not a conspirator. 18 U.S.C. § 2. "Aider" and "abettor" are not terms which necessarily presuppose the existance of a prior conspiracy. An aider or abettor is one who "consciously shares in a criminal act," and such person is to be punished as a principal, "regardless of the existence of a conspiracy." See Pereira v. United States, 347 U.S. 1, 11 (1954), and Nye & Nissen v. United States,

336 U.S. 613 (1949).

As above mentioned, Blanton was sentenced to six months, and in addition fined $200 on each of the seventeen substantive counts on which he was convicted. His codefendant, Joe Bodin, who pleaded guilty to conspiracy and had the remaining counts dismissed, was later sentenced to one year probation, and fined $500. Blanton complains about the disparity in sentences. The maximum sentence that could have been imposed on Blanton was one year imprisonment and a fine of $1000 on each count. 17 U.S.C. § 104. The sentence thus imposed on Blanton is well within the statutory limit and connot now be disturbed by us. United States v. Sierra, 452 F.2d 291 (10th Cir. 1971).

Blanton also asserts that his conviction should be reversed because of improper and prejudicial comment by the Government prosecutor in his closing argument. The charge is that the Gov-

ernment was guilty of "bush league" tactics. This is sheer hyperbole and finds no support in the record. In his closing argument counsel argued that Blanton in selling the copies of copyrighted sound recordings had no guilty knowledge, and that he, Blanton, had relied on Bodin's statement that everything was "above board." In rejoinder the Government attorney simply observed that there was no testimony to support this statement. Such in our view is not improper comment concerning Blanton's failure to testify. Blanton indeed had the right not to testify, but such does not permit defense counsel to thereafter in effect testify in behalf of his client through the medium of closing argument. We find no reversible error in the closing argument of Government counsel.

The final ground urged for reversal is the alleged insufficiency of the evidence. In this regard an FBI agent by way of routine investiga-

tion advised Blanton, along with others, of the 1972 amendment which afforded protection to copyrighted sound recordings. Notwithstanding such warning, the Bodins thereafter manufactured the infringing tapes which Blanton then distributed by selling them at a profit. Also, Bodin testified that on occasion Blanton even brought him the "master" tapes from which duplications were made. The state of the record is such as to permit the jury to infer, as it did, that there was "willful involvement" on the part of Blanton.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. CR-74-61
JOSEPH BURTON BODIN, ET AL., Defendants.	)	

ORDER ON MOTIONS TO DISMISS
INFORMATION BY ALL DEFENDANTS

The defendants, Joe Linden Blanton and La Belle, Inc., have filed herein a Motion to Dismiss the information, which they have erroneously labeled "Motion to Dismiss Indictment". The defendants, Joseph Burton Bodin, William Albert Bodin, Hemisphere Sounds, Inc., Broken Arrow Productions, Inc., have joined in a separate "Motion to Dismiss Information and request for oral argument". The motions are similar in content and

only one brief has been submitted in behalf of all defendants. Therefore, the court will treat the motions together.

In Count 1 of the Information the defendants Joseph Burton Bodin, William Albert Bodin and Joe Linden Blanton are charged with violating 18 U.S.C. § 371 in that they conspired together "to wilfully and for profit infringe the copyright of sound recordings copyrighted pursuant to the provisions of Title 17, United States Code, by manufacturing and selling copies of such recordings without authorization of the copyright owners, in violation of Sections 101(e) and 104 of Title 17, United States Code."

In Counts 2 through 27 all defendants are jointly charged with particular violations of 17 U.S.C. §§ 101(e) and 104. In short the defendants are charged with what is now commonly referred to as "tape piracy" i.e. they duplicated and sold without authorization recordings of perfor-

mances by major musical artists.

In 1971 the Federal Copyright Statutes were amended to permit federal copyright protection of sound recordings. Pub. L. 92-140, 85 Stat. 391. Section 3 of the Amendment, however, provides that a sound recording is eligible for copyright protection only if the sound recording is fixed and first published after February 15, 1972, and before January 1, 1975. In order to receive federal copyright protection a sound recording must be published with a Notice of Copyright, 17 U.S.C. §10. Such notice must be placed on the surface of reproductions of the sound recording or on the label or container in such manner and location as to give reasonable notice of the claim of Copyright. 17 U.S.C. § 20. The notice must consist of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording and the name or recognizable abbreviation of the name of the copyright owner. 17 U.S.C. § 19.

The act of publication with the prescribed copyright notice secures copyright protection. 17 U.S.C. § 10. The unauthorized manufacture, use or sale of a copy of a sound recording constitutes an infringement of the copyrighted work. 17 U.S.C. 101(e). If the infringement is wilful and for profit the person responsible is subject to the criminal sanctions of 17 U.S.C. § 104 which imposes a misdemeanor penalty "of imprisonment for not exceeding one year or by a fine of not less than $100, no more than $1000, or both" upon conviction.

The defendants contend that the amended statute relied upon by the plaintiff, to-wit 17 U.S.C. § 101(e) and 104 are unconstitutional. Their attack is two-pronged. First, they rely upon the first amendment. They assert that provisions of the 1971 amendment are "unconstitutional as a denial of freedom of expression and tends to destroy the public right to enjoy the

arts promoted by individuals." We do not find any denial of freedom of expression to the "tape pirate". What he seeks is not the freedom to express himself artistically or otherwise, but the right to make exact and identical copies of sound recordings produced by others. We fail to see as any protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a single long-playing record of a musical performance. In commenting upon similar claims of a "tape pirate" in Duchess Music Corp. v. Stern, 458 F.2d 1305 (CA9 1972), the court said:

> "Rosner may, of course, record appellant's songs, when she hires musicians, artists, and technicians. Instead, she steals the genius and talent of others. She deceives others into thinking that her tapes represent her own work. She has no 'right to copy'."
> 458 F.2d at 1311.

The statute, as amended, places no impediment to the defendants collecting their own talent

and technicians to imitate on a new tape or record a performance embodied on the protected sound recording. There is here no restraint placed on the use of an idea or concept.

Art. I § 8, Cl.8, of the Constitution gives to Congress the power -

> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . ."

In Goldstein v. California, 412 U.S. 546 (1973) the Supreme Court considered the relationship between the federal copyright law prior to the 1971 amendment and a California statute prohibiting the "piracy" of sound recordings by copying without permission of the recording company. The petitioners in that case were charged with copying recordings fixed prior to February 15, 1972, in violation of the California statute. The Court found that the state statute was not void under the Supremacy Clause as there was no

conflict between the 1971 federal statute and the state law because Congress had not treated with sound recordings fixed prior to February 15, 1972. The court, however, left no doubt that Congress could have afforded the copyright protection which the state had provided. It declared:

> "By Art. I, § 8, Cl. 8, of the Constitution the States granted to Congress the power to protect the 'Writings' of 'Authors.' These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an 'originator,' 'he to whom anything owes its origin.' Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). Similarly, although the work 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor. Ibid.; Trade-Mark Cases, 100 U.S. 82, 94 (1879). Thus, recordings of artistic performances may be within the reach of Clause 8."
> 412 U.S. at 561.

The defendants in their challenge to the

constitutional validity of the amended statutes next place reliance upon the 14th Amendment ot the Constitution. Obviously, their reliance is misplaced as the 14th Amendment inhibits only state action and does not apply to Congress. We will, however, treat their due process contention:

> "The lack of adequate provisions for compulsory licensing under 17 U.S.C. § 1(f) for sound recordings while providing the same for 17 U.S.C. § 101(e) for musical compositions is a direct denial of due process which discriminates between the rights of a recording company and of legitimate sound recording distributors."

as a claim for relief under the 5th Amendment. Persuasive to us is the reasoning of the court in the case of Schaab v. Kleindienst, 345 F.Supp. 589 (D.C. D.C. 1972). There the plaintiff in seeking to enjoin the criminal provisions of the copyright act advanced the same argument as these defendants. In affirming the constitutionality of the statute, the court said:

> "Technical advances, unknown and unanitcipated in the time of our founding fathers, are the basis for the sound recording industry. The copyright clause of the Constitution

must be interpreted broadly to provide protection for this method of fixing creative works in tangible form.

. . . . . .

"The 1909 revision of the copyright clause contains a compulsory licensing provision with respect to copyrighted musical compositions. There is no such provision in 92-140. The Court finds this distinction between the two provisions is rational and reasonable. The provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition.

"If Congress in 92-140 had extended the compulsory licensing provisions to call for licensing of companies that wish to make and sell identical versions of the recorded compositions, these public benefits would not result. Consumer choices would not be broadened since identical interpretations would be supplied first by the originator and later by the licensee. Equally important, competition and the creative aspects of the industry would be impaired since established recording firms would be discouraged from investing in new arrangements and performers, if they were compelled to license their successful interpretations to those desiring to take advantage of the originator's initiative and to add nothing themselves." 345 F. Supp. at 590.

The real thrust of defendants' argument is that the Act now restricts competition in the record industry and grants a monopoly to the record manufacturer which is not in the public interest and more particularly the interest of independent sound recording distributors. This policy argument, however, must be addressed to the Congress and not to this court. Certainly by definition a copyright provides a monopoly over certain expression, but as the Supreme Court has pointed out:

> "[W]hether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress. The history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy. As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated."
> Goldstein v. California, supra at 562.

We find no merit in the defendants' challenge to the constitutionality of the statutes.

The defendants further move the court to dismiss each of the counts of the Information for the reason that the charges are vague and ambiguous and do not state sufficient facts to constitute an offense against the laws of the United States. The crime of "record piracy" in violation of 17 U.S.C. §§ 101(e) and 104 consists of four essential elements: (1) a copyrighted sound recording is manufactured, used or sold; (2) without authorization; (3) wilfully and (4) for profit. The defendants suggest that it is essential that the government allege that the compulsory license provisions of § 101(e) have not been complied with. The 1971 amendment to the Copyright Act retains compulsory licensing of musical compositions but it does not extend compulsory licensing to sound recordings. Schaab v. Kleindienst, supra. The reference in § 101(e) to the compulsory

license provisions of the Act pertains only to the use of a copyrighted musical composition, and not to the duplication of protected sound recordings. In fact, the activities of a "tape pirate" have never fallen within the ambit of the compulsory license provisions of 17 U.S.C. §§ 1(e) and 101(e). Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., _____F. 2d _____ (CA10 2-28-74).

The Information is a plain, concise and definite written statement of the essential facts charged as required by Rule 7(c), Federal Rules of Criminal Procedure. In Hagner v. United States, 285 U.S. 427, 431 (1930) the Supreme Court stated:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of

> what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

The test of the sufficiency of an indictment or information in this circuit is as follows:

> "Imperfections of form that are not prejudicial are disregarded and common sense prevails over technicalities. The sufficiency of indictment must be determined on the basis of practical rather than technical considerations and the validity of attacks on them must be considered from a broad and enlightened standpoint of right reason rather than from a narrow view of technicality and hair-splitting." Robbins v. United States, 476 F.2d 26, 30 (CA10 1973).

In Count 1 of the Information the object of the conspiracy is specifically defined and 6 overt acts to accomplish the same are set forth. This count sufficiently advises the defendants, Joseph Burton Bodin, William Albert Bodin and Joe Linden Blanton of what they must be prepared to meet. For each of Counts 2 through 27 it is respectively alleged that

a particular copyrighted sound recording identified by name, artist, copyright owner, and registration number was manufactured and sold by the defendants. Each such sound recording is alleged to have been first fixed and published with requisite notice of copyright after February 15, 1972 and duly registered in the United States Copyright Office under the specified registration numbers in Class N, pursuant to the provisions of Title 17, United States Code. It is alleged that such manufacture and sale was done without authorization and wilfully and for profit. Each count of the Information clearly informs the defendants of the precise offense of which they are accused so that they may prepare their defense and so that a judgment thereon will safeguard them from a subsequent prosecution for the same offense. No more is required. United States v. Debrow, 346 U.S. 374 (1953).

The counts of the Information are not duplicitous as claimed by the defendants. It is manifest that the defendants are charged with infringing and conspiring to infringe, copyrighted sound recordings and not the infringement of copyrighted musical compositions. Under the allegations contained in the Information we do not perceive how the defendants could possibly be misled as to the offenses with which they stand charged.

The individual defendants have also suggested that the Information is defective because it does not allege the capacity in which they were acting at the time of the alleged violations. They apparently presume in reliance upon a civil case that they would not be criminally responsible if they were acting merely as officers of the corporate defendants. However, 17 U.S.C. § 104 makes it an offense not only to infringe a copyright wilfully and for profit but as well to knowingly and wilfully

aid and abet such an infringement. See also 18 U.S.C. § 2. An aider and abettor may be charged and convicted as a principal. Nance v. Baker, 400 F.2d 864 (CA10 1968). See also United States v. Pickens, 465 F.2d 884 (CA10 1972).

The defendants Bodin and Hemisphere Sounds, Inc., and Broken Arrow Productions, Inc., also assert that Counts 2 through 27 should be dismissed because the sound recording copyrights allegedly infringed were for various reasons not valid copyrights. This is defensive matter. It is basic that the sufficiency of an Information must be determined solely from the face of the Information; therefore, this court will not attempt to determine the merits of this case by a reference to the facts as they are alleged to be by the defendants in their motion or brief, but will restrict its consideration to the facts properly alleged in each count of the Information. As our previous discussion indicates the

facts alleged are sufficient to meet the required standards.

ACCORDINGLY, IT IS ORDERED:

1. That the Motion to Dismiss by the defendants, Joseph Burton Bodin, William Albert Bodin, Hemisphere Sounds, Inc., and Broken Arrow Productions, Inc., is denied.

2. The Motion to Dismiss by the Defendants, Joe Linden Blanton and La Belle, Inc., is denied.

3. That the request for oral argument by the defendants Joseph Burton Bodin, William Albert Bodin, Hemisphere Sounds, Inc. and Broken Arrow Productions, Inc., is denied.

Dated this 7th day of May, 1974.

Fred Daugherty
United States District Judge

UNITED STATES CODE,

THE FEDERAL COPYRIGHT ACT (Pertinent Sections)

17 U.S.C. 101(e)

§101 Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(e) Interchangeable parts for use in mechanical music-producing machines. -- Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement or profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at

his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

As amended October 15, 1971, Pub.L. 92-140, § 2, 85 Stat. 392.

17 U.S.C. 104

§104 Wilful Infringement For Profit

Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court: Provided, however, that nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses, by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit. (July 30, 1947, C. 391, §1, 61 Stat. 652.)

17 U.S.C. 1(f)

§1. Exclusive Rights As To Copyrighted Works:

Any person entitled thereto, upon complying with the provisions of this title, shall have exclusive right:

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyright of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, that this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recordings; or to reproductions made by transmitting organizations exclusively for their own use:

(As amended October 15, 1971, Pub. L. 92-104 §1(a), 85 Stat. 391.)